Ringgit Exoticka Sdn Bhd v Pengarah Tanah & Galian Selangor & Ors

HIGH COURT (SHAH ALAM) — APPLICATION FOR JUDICIAL REVIEW NO 25–168–12 OF 2012
VERNON ONG J
22 FEBRUARY 2013

Civil Procedure — Affidavit — Admissibility — Delay — Personal knowledge — Affidavit in reply filed out of time and not served on applicant — Whether affidavit inadmissible

Civil Procedure — Judicial review — Certiorari — Land acquisition — Whether decision to acquire land tainted with 'ulterior motives' — Whether 'bad faith' and 'selective acquisition' — Whether acquisition not for actual public purpose — Whether respondent exceeded its statutory powers — Whether Forms E and F not issued — Whether not in accordance with principle of Wednesbury 'reasonableness' — Land Acquisition Act 1960 s 3(1)(a)

Land Law — Land acquisition — Judicial review — Whether decision to acquire land tainted with 'ulterior motives' — Whether 'bad faith' and 'selective acquisition' — Whether acquisition not for actual public purpose — Whether respondent exceeded its statutory powers — Whether Forms E and F not issued — Whether not in accordance with principle of Wednesbury reasonableness — Land Acquisition Act 1960 s 3(1)(a)

The applicant applied for judicial review of the decision of the third respondent to acquire the applicant's land under s 3(1)(a) of the Land Acquisition Act 1960 ('Act') for restructuring of Bandar Alam Mutiara. The application for judicial review was premised on the following grounds: (a) that the decision to acquire the land was tainted with 'ulterior motives' of the respondent through the action of the Menteri Besar of Selangor ('MB') in practising 'land grab'; (b) that there had been 'bad faith' and 'selective acquisition' in that company's link to the MB such as Glomac Bhd was favoured; (c) that the decision to acquire the land was tainted with illegality, without sufficient reasons, or grounds and or having taken irrelevant consideration and was contrary to the principle of proportionality; (d) that the purpose as found under *Warta 4459* for 'public purpose' in essence was not for actual public purpose within the meaning of s 3(1)(a) of the Act; (e) that the respondent had misconstrued its statutory powers and or exceeded its powers under the Act; (f) that the Forms E and F were never issued nor served until the request made on the date of enquiry held

on 6 December 2012; and (g) that the decision arrived at and the issuance of the mandatory forms were not in accordance with the principle of 'reasonableness' within the 'Wednesbury' principles. The respondents filed an affidavit in reply out of time and did not serve a copy of the affidavit on the applicant. The respondents' counsel submitted that the deponent of the applicant's affidavit in support did not have any personal knowledge of the relevant matters.

Held, dismissing the application for judicial review with costs:

(1) As the respondents did not obtain any leave of court to file their affidavit out of time, their affidavit was not admitted in evidence (see para 27).

(2) An affidavit relied upon as evidence in support of an application should only contain facts which are within the personal knowledge of the deponent. Personal knowledge may be derived from records or documents seen by the deponent. An affidavit which is based on information and belief but is not stated to be so and which fails to disclose the sources and grounds will be disallowed in evidence. Hearsay evidence which do not disclose the sources and grounds will not be accorded any probative value. Hence, the relevant statements and the documents contained in the applicant's affidavits were expunged (see paras 29–30).

(3) As it was the applicant's case that there was improper motive and mala fide on part of the respondents, it was incumbent upon the applicant to introduce the necessary evidence in support of its allegation. There was no evidence before the court to show that there was any improper motive or mala fide on the part of the respondents (see para 51).

(4) The Forms E and F were in fact served on the applicant on 6 December 2012. Even if the Form E was not served on the applicant, it is provided in the last paragraph in s 11(1) that no omission or failure to serve such notice shall invalidate any enquiry held pursuant to the notice or any award made upon the conclusion of the enquiry. At any rate, at the request of the applicant's counsel, the court had ordered a stay of proceedings of the enquiry pending the disposal of the action. As such, there was no prejudice to the applicant (see para 53).

(5) There was nothing to persuade the court that the true intention of the respondents was to circumvent or override s 3(1)(b) or (c) of the Act. The fact that there was a development approval of the land did not necessarily preclude the respondents from making an acquisition under s 3(1)(a) (see para 55).

[Bahasa Malaysia summary

Pemohon memohon untuk semakan kehakiman keputusan responden ketiga untuk mengambil alih tanah pemohonan di bawah s 3(1)(a) Akta Pengambilan

Tanah 1960 ('Akta') untuk penstrukturan semula Bandar Alam Mutiara. Permohonan untuk semakan kehakiman adalah berdasarkan atas alasan-alasan berikut: (a) bahawa keputusan untuk mengambil alih tanah dicemar dengan 'ulterior motives' oleh responden melalui tindakan Menteri Besar Selangor ('MB') dalam mengamalkan 'land grab'; (b) bahawa terdapat 'bad faith' dan 'selective acquisition' yang mana hubungan syarikat kepada MB seperti Glomac Bhd mendapat sokongan; (c) bahawa keputusan untuk mengambil alih tanah dicemar dengan salah guna undang-undang, tanpa alasan-alasan yang mencukupi, atau alasan dan atau dengan mengambil kira pertimbangan yang tidak relevan dan bertentangan kepada prinsip kekadaran; (d) bahawa tujuan seperti yang didapati di bawah *Warta 4459* untuk 'public purpose' pada dasarnya bukan untuk tujuan awam sebenar dalam maksud s 3(1)(a) Akta; (e) bahawa responden telah salah tafsir kuasa statutorinya dan atau melebihi kuasanya di bawah Akta; (f) bahawa Borang E dan F tidak pernah dikeluarkan atau diserahkan sehingga permohonan dibuat pada tarikh siasatan diputuskan pada 6 Disember 2012; dan (g) bahawa keputusan yang dicapai dan pengeluaran borang-borang mandatori adalah tidak mengikuti prinsip 'reasonableness' di dalam prinsip 'Wednesbury'. Responden memfailkan afidavit jawapan di luar masa dan tidak menyerahkan salinan afidavit ke atas pemohon. Peguam responden berhujah bahawa deponen afidavit sokongan pemohon tidak mempunyai apa-apa pengetahuan peribadi terhadap perkara relevan.

Diputuskan, menolak permohonan untuk semakan kehakiman dengan kos:

(1) Memandangkan responden-responden tidak mendapatkan apa-apa izin mahkamah untuk memfailkan afidavit mereka di luar masa, afidavit mereka tidak dimasukkan sebagai keterangan (lihat perenggan 27).

(2) Afidavit yang digunakan sebagai keterangan untuk menyokong permohonan sepatutunya hanya mengandungi fakta yang berada dalam pengetahuan peribadi deponent. Pengetahuan peribadi mungkin berbangkit daripada rekod atau dokumen yang dilihat oleh deponen. Afidavit yang mana berdasarkan atas maklumat dan kepercayaan tetapi tidak seperti yang dinyatakan dan yang mana gagal untuk mengemukakan punca dan alasan akan ditolak dalam keterangan. Keterangan kata dengar yang mana tidak mengemukakan punca dan alasan tidak akan diberikan apa-apa nilai probatif. Maka, pernyataan relevan dan dokumen yang terdapat di dalam afidavit pemohon adalah dipotong (lihat perenggan 29–30).

(3) Memandangkan ia adalah kes pemohon bahawa terdapat motif tidak wajar dan mala fide oleh pihak responden-responden, adalah wajib ke atas pemohon untuk mengemukakan keterangan yang penting dalam menyokong dakwaannya. Tidak terdapat keterangan di hadapan

mahkamah untuk menunjukkan bahawa terdapat apa-apa motif yang tidak wajar atau mala fide oleh pihak responden-responden (lihat perenggan 51).

(4) Borang E dan F telah sebenarnya diserahkan kepada pemohon pada 6 Disember 2012. Walaupun Borang E tidak diserahkan kepada pemohon, ia diperuntukkan di dalam perenggan terakhir dalam s 11(1) bahawa peninggalan atau kegagalan untuk menyerahkan notis akan mentaksahkan apa-apa siasatan yang diputuskan berikutan kepada notis tersebut atau apa-apa award yang dibuat atas kesimpulan siasatan itu. Walau bagaimanapun, atas permintaan peguam pemohon, mahkamah telah memerintahkan penangguhan prosiding siasatan sementara menunggu tindakan ini. Oleh yang demikian, tiada prejudis terhadap pemohon (lihat perenggan 53).

(5) Tidak terdapat apa-apa untuk menyakinkan mahkamah bahawa niat sebenar responden-responden adalah untuk memintas atau menolak s 3(1)(b) atau (c) Akta. Fakta bahawa terdapat kelulusan pembangunan tanah tersebut tidak semestinya menghalang responden-responden daripada membuat pengambilan tanah di bawah s 3(1)(a) (lihat perenggan 55).]

Notes

For a case on admissibility, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) para 371.

For cases on certiorari, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 5116–5117.

Cases referred to

Abd Hamid bin Jaafar (trading as sole proprietor as Bintang Enterprise) v Shamsiah dan Keluarga Sdn Bhd [2004] 5 MLJ 349; [2004] 5 CLJ 381, HC (refd)

Abdul Halim bin Abdul Hanan & Ors v Pengarah Penjara, Taiping & Ors [1996] 4 MLJ 54; [1996] 1 AMR 1217, HC (refd)

Ahmad bin Saman v Kerajaan Negeri Kedah [2003] 4 MLJ 705; [2004] 1 CLJ 211, CA (refd)

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223, CA (refd)

B Surinder Singh Kanda v The Government of the Federation of Malaya [1962] 1 MLJ 169, PC (refd)

Chio Tan Seng & Ors v Chong Chai Huat & Ors [1997] MLJU 348; [1997] 4 CLJ Supp 116, HC (refd)

Datin Melati Abdullah & Ors v Syed Hassan Syed Salim [1999] MLJU 420; [1999] 5 CLJ 582, HC (refd)

Dr Abdul Rashid bin Abdul Majid lwn Yee Eh Farn [2005] 5 MLJ 469, HC (refd)

A *Dyancast (S) Pte Ltd v Lee Meng Siang & Ors* [1989] 3 MLJ 456; [1989] SLR 840, HC (refd)
Gilbert v Endean (1878) 9 Ch D 259, CA (not folld)
Hong Lee Trading & Construction Sdn Bhd v Taut Ying Realty Sdn Bhd [1991] 1 MLJ 250, HC (refd)
B *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481, CA (refd)
J (An Infant), Re [1960] 1 All ER 603, Ch D (refd)
Young JL Manufacturing Co Ltd, Re, Young v JL Young Manufacturing Co Ltd [1900] 2 Ch 753, CA (refd)
C *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789 (FC); [1997] 2 CLJ 11, SC (refd)
Larut Consolidated Bhd & Anor v Khoo Ee Bee & Ors [1997] 5 MLJ 77, HC (refd)
Lee Chin Ho & Anor v Syed Hussein bin Salim Al-Attas & Anor [2000] 4 MLJ 46,
D HC (refd)
Lim Yew Seng v Hummel International & Leisure A/S [1996] 3 MLJ 7; [1997] 1 AMR 48, CA (refd)
Menara PanGlobal Sdn Bhd v Ariokianathan a/l Sivapiragasam [2006] 3 MLJ 493, CA (refd)
E *Michael Lee Fook Wah v Minister of Human Resources, Malaysia & Anor* [1988] 1 MLJ 305, CA (refd)
Minister of Labour, Malaysia v Lie Seng Fatt [1990] 2 MLJ 9, SC (refd)
Mohamad bin Hassan & Ors v Dewan Bandaraya Kuala Lumpur & Anor [2001] 4 MLJ 423; [2002] 1 CLJ 290, HC (refd)
F *Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors* [2011] 6 MLJ 507, CA (refd)
NV Sumatra Tobacco Trading Company v Pt Sampoerna JL Sdn Bhd [1997] 3 CLJ 946, HC (refd)
Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd [1984] 2 MLJ 143
G (refd)
Pacific Inter-Link Sdn Bhd v The owners of the ship 'Makatsarija' [1999] MLJU 721; [2000] 2 CLJ 679, HC (refd)
Perumahan Farlim (Pg) Sdn Bhd v Cheng Hang Guan & Ors [1989] 3 MLJ 223, SC (refd)
H *Petroliam National Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625, FC (refd)
Quah Swee Khoon v Sime Darby Bhd [2000] 2 MLJ 600; [2000] 2 AMR 2265, CA (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ
I 145, FC (refd)
Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 1, FC (refd)
Rinol Malaysia Sdn Bhd v MBT (Malaysia) Sdn Bhd [2002] 6 CLJ 63, HC (refd)

Rohana bte Ariffin & Anor v Universiti Sains Malaysia [1989] 1 MLJ 487; [1988] 2 CLJ Rep 390, HC (refd)
Rossage v Rossage and others [1960] 1 All ER 600, CA (refd)
S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors [1982] 1 MLJ 204; [1982] CLJ 65; [1982] CLJ (Rep) 314, FC (refd)
Societe Jas Hennessy & Co & Anor v Nguang Chan (M) Sdn Bhd [2005] 4 MLJ 348, HC (refd)
Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor [1998] 3 MLJ 289; [1998] 3 CLJ 85, CA (refd)
Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261, CA (refd)
United Malayan Banking Corp v Yap Peng Wai @ Yap Peng Hooi [1998] 5 MLJ 511, HC (refd)
Wong Hong Toy & Anor v PP [1988] 2 MLJ 553 (refd)
Zamrud Properties Sdn Bhd v Pang Mooi Gaid & Anor [1999] 5 MLJ 180; [1990] SLR 785, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 3, 25(2), Schedule para 1
Land Acquisition Act 1960 ss 3A(2), 3(1)(a), 3(b), (c), 8, 8(3), 9, 9(1), (2), 11(1), (2), 36, Forms D, E, F
Rules of Court 2012 O 3 r 5, O 14 rr 2(2), 5(2), O 30 r 4, O 32 r 13(2)(b), O 33 r 2, O 38 r 3(2), Order 49 r 2, O 50 r 3, O 53 rr 2(4), 3(6)
Specific Relief Act 1950 s 44

(Ananthan Ragawan (Ananth & Associates) for the applicant.
Ahmad Fuad bin Othman (State Assistant Legal Advisor, Selangor Legal Advisor Offices) for the respondent.

Vernon Ong J:

[1] This is an application for the judicial review of a decision of the third respondent to acquire the applicant's land under the Land Acquisition Act 1960 ('LAA').

BRIEF ACCOUNT OF THE FACTS

[2] The applicant is the registered owner of a plot of land held under HS(D) 5474 PT 9149 Mukim Ijok, District of Kuala Selangor ('the land').

[3] Pursuant to the Government of Selangor Gazette No 4459 dated 11 October 2012, the third respondent proposed to acquire the land under s 3(1)(a) of the LAA for restructuring of Bandar Alam Mutiara and matters related thereto. The requisite Forms E and F under the LAA have been served

on the applicant on 6 December 2012. The second respondent is in the process of conducting an inquiry for the acquisition of the land.

Requirement for leave to make an application for judicial review

[4] As a rule, the applicant for judicial review must be preceded by an application for leave to make the application for judicial review. What this means is that the applicant cannot apply for judicial review unless he has first obtained 'leave' (permission) of the court. An application for leave must also be made within three months from the date the impugned decision is first communicated to the applicant. This requirement is embodied in the O 53 r 3(6) of the ROC 2012.

[5] In essence, the requirement for leave acts as a safeguard against its abuse built into the judicial review. It also serves as a useful filter against frivolous or vexatious applications. It ensures that the court exercises its discretion only to deal with the obvious cases where, whatever the merits, the court should not intervene as when there is an alternative and better remedy or because there has been excessive delay. Thirdly, it also serves to reduce as far as is consistent with the court's role of reviewing administrative action, the interference to which public bodies are subject.

[6] As a prerequisite, the applicant must satisfy the court that he has the locus standi to file the judicial review application; and in order to do so, he has to show that he is a person who is adversely affected by the decision (O 53 r 2(4) of the ROC 2012).

[7] In performing its task at the leave stage, before the court grants relief it is required to ask itself the question of whether justice requires the decision or action of the administrative or public body to be quashed or otherwise interfered with by the courts. If looking at the situation as a whole there has been unfairness then the court must interfere unless there is very good reason for not doing so. On the other hand, if there is, or has been some procedural error but the result is not unjust or unfair then the court in its discretion should be ready to refuse relief. Invariably, there are a multitude of considerations which will point in different directions in each case. In short, an applicant had to show that there were some error on the face of the record or some jurisdictional error.

[8] In this instance, the applicant obtained leave on 13 December 2012.

JUDICIAL REVIEW IN MALAYSIA

[9] Judicial review is a branch of law dealing with administrative law. In its

traditional sense, it refers to the exercise of the court's supervisory powers over the decisions of inferior tribunals and statutory bodies. The decisions are tested against established principles developed over time by the common law (see recent decision of the Court of Appeal in *Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors* [2011] 6 MLJ 507).

[10] The powers of the High Court of judicial review is enshrined under the Specific Relief Act 1950 and the Courts of Judicature Act 1964 ('CJA 1964'); in particular the additional powers which are set out in para 1 of the Schedule to s 25(2) of the CJA 1964. It empowers the High Court to issue to any person of authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution. In fact, an application for judicial review may include a prayer for a declaration (O 53 r 2(4) of the ROC 2012). In the context of an application for judicial review of a decision of an inferior tribunal or statutory body, the Court is usually called upon to make an order for mandamus, prohibition or certiorari. An order of certiorari has the effect of quashing a decision of a judicial or quasi-judicial authority with the intention of restraining any ultra vires exercise of powers. An order of mandamus is directed to private or municipal corporations, or to any of its officers, commanding the performance of a particular act or duty mandated by law (see s 44 of the Specific Relief Act 1950). An order of prohibition is directed only against a judicial or quasi-judicial authority in respect of proceedings before them.

Distinction between public law proceedings and private law proceedings

[11] Underlying the distinct nature of an application for judicial review is the requirement in Malaysian common law to have regard to the interest of good administration. In order to appreciate this concept, it is essential to draw a distinction between public law proceedings and private law proceedings.

[12] In private law proceedings, it is the parties alone who are directly concerned with the outcome of the litigation. The public at large are not usually interested in the outcome. Be that as it may, the public as a whole are concerned only that private law proceedings should provide a fair and efficient manner of resolving disputes between individuals and of enforcing the rights of one individual over another.

[13] In contrast, public law proceedings usually affect many members of the public or even the public at large as well as the parties to the proceedings (eg, decisions of public bodies concerning *orang asli* native land rights, environment issues, planning permission, public nuisance, etc). Other members of the public will be interested to a lesser extent, whether financial or

otherwise. However, there are also public law proceedings which do not usually affect the members of the public. A common example of this involves a person's application to quash the decision of the Industrial Court dismissing his claim for reinstatement on the ground of unlawful dismissal. In these cases, the court will be largely, if not exclusively, concerned with the merits of the application alone. Both sets of proceedings are treated as public law proceedings because the decision is taken by a public body performing a public duty. Typically, the public bodies *qua* respondents in an application for JR would be the Ministry of Human Resource, Minister of Home Affairs, Registrar of Societies, State Executive Council, Registrar of Land and Mines, BURSA Malaysia, Securities Commission, Government departments (such as Immigration, Royal Customs, Royal Malaysian Police), tribunals (such as Housing Tribunal, Consumer Claims Tribunal), statutory bodies (Malaysian Medical Council, Lembaga Akitek Malaysia), Service Commissions, Director General of Inland Revenue and Majlis Agama Islam, to name a few.

[14] As a general rule, the court has to take into account not only the interests of the applicant and the respondent but also the interests of the public as a whole in good administration.

[15] Judicial review is therefore primarily concerned with enforcing public duties on behalf of the public as a whole. In this sense, the court's concern with vindicating the interests of the individual is part of the process of ensuring that public bodies do not act unlawfully and that they do perform their public duties.

PRINCIPLES OF JUDICIAL REVIEW

[16] At the outset it should also be noted that the remedy of judicial review is not concerned with reviewing the merits of the decision in which the application for judicial review is made. Instead, the remedy of judicial review is primarily a review of the decision making process. In performing this role the court is sitting in its supervisory jurisdiction and not in its appellate jurisdiction. (*Michael Lee Fook Wah v Minister of Human Resources, Malaysia & Anor* [1988] 1 MLJ 305). The court will not interfere with the exercise of any power or discretion which has been conferred on an inferior court, administrative tribunal or other public authority. However, the decision of the body may be quashed by an order of certiorari where (a) that body has acted without jurisdiction; or (b) that body has exceeded its jurisdiction; or (c) body has failed to comply with the rules of natural justice in a case where the rules are applicable; or (d) there is an error of law on the face of the record or the decision is unreasonable in the *Wednesbury* sense. In short, whether certiorari will lie to quash the decision which has already been made by that body depends not on the decision itself but on whether the decision was made ultra vires, unfairly or

unjustly in the exercise of the discretion. In dealing with this application for judicial review there are fundamental principles to be applied within regard the principles enunciated by the Court Of Appeal in a case involving a judicial review of an award of the Industrial Court are instructive. In *Menara PanGlobal Sdn Bhd v Ariokianathan a/l Sivapiragasam* [2006] 3 MLJ 493 (CA) at p 511 Mohd Ghazali JCA (later FCJ) said:

> From the authorities discussed above, I would think that *in dealing with judicial review a judge should have the following principles, inter alia, in the forefront of his mind*:
>
> (i) *judicial review is not an appeal from a decision but a review of the matter in which the decision was made;*
>
> (ii) *the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable;*
>
> (iii) *the High Court through judicial review, should not introduce technicalities of the court of law* to the Industrial Court; this would certainly be so as s 30(5) of the Act imposes a duty upon the Industrial Court to have regard to substantial merits of the case rather than to technicalities and it also requires the Industrial Court to decide a case in accordance with equity and good conscience;
>
> (iv) the main and only function of the Industrial Court in dealing with a reference under s 20 of the Act is to determine whether the misconduct or irregularities complained of by the management as to the grounds of dismissal were in fact committed by the workman and if so, whether such grounds constitute just cause or excuse for the dismissal.
>
> (v) *the Industrial Court should not be burdened with the technicalities regarding standard of proof, the rules of evidence and procedure that are applied in the court of law;*
>
> (vi) *the High Court will not interfere with findings of fact by the Industrial Court unless the same are completely unsupported by evidence and further, will not interfere merely because it may come to different conclusions on facts on the basis of the same evidence; weighing and assessing the evidence of the witnesses is the function of the Industrial Court and not that of the High Court.*
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> (Emphasis added.)

[17] Against the backdrop of the Court of Appeal's decision in, in *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1 (FC) the Federal Court held that the distinction between review and appeal no longer holds. The principles to which a reviewing court should scrutinise included the following matters:

(a) the decision making process where the impugned decision is flawed on the ground of procedural impropriety;

(b) the merits where the decision is grounded on illegality or plain irrationality;

(c) the findings where the facts do not support the conclusion arrived at by a tribunal; or

(d) the findings where the findings of the tribunal had been arrived at by taking into consideration irrelevant matters, and had failed to take relevant matters into consideration.

[18] Be that as it may, the power to review a decision on its merits is not absolute. In cases involving public policy, national interest, public safety or national security, it may be inappropriate to go into the merits or otherwise of a decision during a judicial review application (*Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789 (SC); [1997] 2 CLJ 11; *Petroliam National Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625 (FC)).

[19] In the light of the above cited authorities, it is settled law that there are three principal grounds upon which a court may review a decision of an inferior tribunal or statutory body. They are:

(a) procedural impropriety;

(b) illegality; and

(c) irrationality.

(a) *Procedural impropriety*

[20] This is a classic case of review of the decision-making process. It addresses the decision-making process to test for procedural fairness with reference to the context and applicable statutory provisions. It includes the right to be heard, the rule against bias and the requirement of prior notice of the decision so that the person affected by the decision will be in a position to make representations and to adequately prepare and answer the case against him. There is also a duty of adequate disclosure. Whilst there must be a fair hearing, there is no general right of oral hearing. There is no general right to call witnesses or to cross-examine witnesses. There is also no general right to legal representation. Whilst there is also no general duty to give reasons, such failure to give reasons may give rise to the inference that there are no valid reasons for the decision. Further, there must be a real hearing. The decision maker cannot fetter its discretion by self-created rules of policy. The decision maker must be impartial and free from bias; the test for bias being absence of direct pecuniary interest (*B Surinder Singh Kanda v The Government of the Federation of Malaya*

[1962] 1 MLJ 169; *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289; [1998] 3 CLJ 85 (CA); *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487; [1988] 2 CLJ Rep 390).

(b) *Illegality*

[21] This involves a review of the decision-making process, not the merits. This is a typical ground for the control of discretionary power. Classic examples of illegality include 'error of law' and 'excess of jurisdiction', abuse of power and anisminic error. Under this head, the court will consider whether the public body in question had acted within the terms of power granted to it and within the bounds of the statutory purpose (*R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 1). Decisions tainted with illegality may arise if a decision maker makes a decision for an extraneous purpose or improper motive or takes into consideration irrelevant factors and or fails to take into consideration relevant factors. The court must also be satisfied that the decision is not actuated by mala fide. The decision-making process must also not violate the rule against delegation of discretionary power or the rule against deciding on no evidence or making findings of fact with no rational evidential basis; though as a rule there is non interference with the assessment of evidence, particularly testimonial evidence (*Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9; *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481; *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600; [2000] 2 AMR 2265).

(c) *Irrationality*

[22] Under this ground, the issue is not whether the decision-maker strayed outside the purposes defined by the governing statute (the 'illegality' test), nor whether the decision was procedurally unfair (the 'procedural propriety' test). The question to be determined is whether the power under which the decision-maker acts, a power which normally confers a broad discretion has been improperly exercised. Therefore, a review under this ground extends beyond the process and to the substance or merits of the decision.

[23] A decision which falls on this ground is said to have failed the Wednesbury unreasonableness test (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223). This is a decision that is said to be so outrageous in its defiance of logic that no sensible person who had applied his mind to it could have arrived at it. It also involves a consideration of the principle of 'proportionality' *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; *Kumpulan Perangsang Selangor v Zaid bin Haji Mohd Noh* [1997] 1 MLJ 789; [1997] 2 CLJ 11). It may also include

decisions taken in bad faith, oppressively or based on considerations which have been accorded manifestly inappropriate weight, in addition to strictly irrational decisions which are illogical or arbitrary (*R Rama Chandran*).

THE APPLICANT'S CASE

[24] In this case, the application for judicial review is premised on the following grounds:

(a) The decision to acquire the land is tainted with 'ulterior motives' of the respondent through the action of the Menteri Besar of Selangor in practising land grab;

(b) There has been bad faith and 'selective acquisition' in that company's link to the Menteri Besar of Selangor such as Glomac Bhd was favoured;

(c) The decision to acquire the land was tainted with illegality, without sufficient reasons, or grounds and or having taken irrelevant consideration and or failed to take into account relevant considerations and in deriving at a decision and or coming to irrational decision, acting unreasonable and in a perverse manner wherein a reasonable authority in the circumstances would not have come to such conclusion and or acting in contrary to the principle of proportionality;

(d) The purpose as found under *Warta 4459* for 'public purpose' in essence is not for actual public purpose within the meaning of s 3(1)(a) of the LAA;

(e) The true intention of the respondents are to circumvent or override s 3(1)(b) and or (c) LAA more so, in view of the fact that the master developer has been granted 'development approval';

(f) The respondent has *misconstrued its statutory powers and or exceeded its powers* under the LAA;

(g) The relevant Forms E and For were never issued not served until the request made on the date of enquiry held on 6 December 2012; and

(h) The decision arrived at and the issuance of the mandatory forms were not in accordance with the principle of 'reasonableness' within the *Wednesbury* principles.

[25] In support of its application for judicial review, the applicant relied on the supporting affidavit and a further affidavit both affirmed by Ng Peng Mun on 4 December 2012 on 27 December 2012 respectively.

[26] The respondents filed an affidavit in reply on 11 January 2012. They did not serve a copy of their affidavit on the applicant. The filing of the

respondents' affidavit in reply is out of time; since the deadline for the filing expired on 5 January 2013. The respondents did not appear at any of the case management conferences on 26 December 2012 and 4 January 2013; no reason was given to explain their absence. As the respondents did not obtain any leave of court to file their affidavit out of time, their affidavit was not admitted in evidence at the hearing of the application for judicial review.

OBJECTION TO HEARSAY EVIDENCE IN APPLICANT'S AFFIDAVIT

[27] Learned counsel for the respondent submitted that the deponent of the affidavit in support does not have any personal knowledge of the matters relating to LBCN Development and Mujur Zaman. Therefore, the affidavit evidence is inadmissible by reason of the fact that the statements therein are hearsay evidence.

[28] As a general rule, hearsay evidence is inadmissible and the court will not admit any hearsay evidence or give it any weight. In the same vein, an affidavit relied upon as evidence in support of an application should only contain facts which are within the personal knowledge of the deponent. Personal knowledge may be derived from records or documents seen by the deponent (*United Malayan Banking Corp v Yap Peng Wai @ Yap Peng Hooi* [1998] 5 MLJ 511; *Abd Hamid bin Jaafar (trading as sole proprietor as Bintang Enterprise) v Shamsiah dan Keluarga Sdn Bhd* [2004] 5 MLJ 349; [2004] 5 CLJ 381).

ADMISSIBILITY AND WEIGHT OF HEARSAY EVIDENCE IN AFFIDAVITS

[29] There are, however, a number of exceptions to this personal knowledge rule as contained in the Rules of Court 2012. Briefly, the exception relates to the following matters:

(a) *Summary judgment applications*
Order 14 r 2(2) provides that affidavits filed in support of and in opposing an application for summary judgment may contain statements of information or belief with their sources and grounds.

(b) *Interlocutory proceedings*
Under O 41 r 5(2) an affidavit filed in interlocutory proceedings may contain statements of information and belief with their sources and grounds.

(c) *Evidence given at trial*
Pursuant to O 38 r 3(2), the court may under certain circumstances order evidence to be given at the trial by statement on oath of information or belief.

(d) *Application for a garnishee order*
Order 49 r 2 permits an application to be supported by an affidavit containing statements of information or belief that the garnishee is within the jurisdiction and indebted to the judgment debtor if the sources for such information or grounds for belief are stated.

(e) *Application for a charging order*
Similarly, under O 50 r 3 an application for a charging order may be supported by an affidavit stated to be the best of information or belief that the judgment debtor is beneficially entitled to an interest in the securities to be charged. For hearsay evidence to be admitted in evidence, the deponent of the affidavit must describe that interest and identify the sources of such information and grounds for belief being stated.
Therefore, an affidavit which is based on information and belief but is not stated to be so and which fails to disclose the sources and grounds will be disallowed in evidence (*Mohamad bin Hassan & Ors v Dewan Bandaraya Kuala Lumpur & Anor* [2001] 4 MLJ 423; [2002] 1 CLJ 290; *Pacific Inter-Link Sdn Bhd v The owners of the ship 'Makatsarija'* [1999] MLJU 721; [2000] 2 CLJ 679). It follows that hearsay evidence which do not disclose the sources and grounds will not be accorded any probative value (*Dynacast (S) Pte Ltd v Lee Meng Siang & Ors* [1989] 3 MLJ 456; [1989] SLR 840).

In the present case, learned counsel for the applicant submitted that the affidavit evidence is admissible as it was filed in interlocutory proceedings. Is the applicant's argument borne out?

WHAT ARE INTERLOCUTORY PROCEEDINGS?

[30] According to the Court of Appeal in *Gilbert v Endean* (1878) 9 Ch D 259 at p 268 interlocutory proceedings may be described as:

(a) proceedings which do not decide the rights of the parties but are made for the purpose of keeping things in status quo till the rights can be decided;

(b) proceedings for obtaining some directions of the court as to how the cause is to be conducted;

(c) proceedings as to what is to be done in the progress of the cause for the purpose of enabling the court ultimately to decide on the rights of the parties.

[31] The principle in *Gilbert v Endean*, has been followed in *Chio Tan Seng & Ors v Chong Chai Huat & Ors* [1997] MLJU 348; [1997] 4 CLJ Supp 116; *Perumahan Farlim (Pg) Sdn Bhd v Cheng Hang Guan & Ors* [1989] 3 MLJ 223 (SC); *Datin Melati Abdullah & Ors v Syed Hassan Syed Salim* [1999] MLJU 420; [1999] 5 CLJ 582; *Mohamad bin Hassan & Ors v Dewan Bandaraya Kuala Lumpur & Anor.*

[32] Interlocutory proceedings include applications for interlocutory injunction (*Perumahan Farlim (Pg) Sdn Bhd v Cheng Hang Guan & Ors, supra*), applications for or extension of a mareva injunction (*Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd* [1984] 2 MLJ 143; *Larut Consolidated Bhd & Anor v Khoo Ee Bee & Ors* [1997] 5 MLJ 77), applications for ex parte anton piller injunction (*Dynacast (S) Pte Ltd v Lee Meng Siang & Ors*), application to restrain the commencement of winding-up proceedings (*Rinol Malaysia Sdn Bhd v MBT (Malaysia) Sdn Bhd* [2002] 6 CLJ 63); applications asking for determination of preliminary issue of *locus standi* of plaintiff under O 33 r 2 and directions and cost in a derivative action (*Chio Tan Seng & Ors v Chong Chai Huat & Ors* [1997] MLJU 348; [1997] 4 CLJ Supp 116); applications for extension to file affidavit in reply under O 32 r 13(2)(b) (*Datin Melati Abdullah & Ors v Syed Hassan Syed Salim*) and under O 3 r 5 (*Lee Chin Ho & Anor v Syed Hussein bin Salim Al-Attas & Anor* [2000] 4 MLJ 46); an application for an order to rank as a debenture holder (*Young JL Manufacturing Co Ltd, Re, Young v JL Young Manufacturing Co Ltd* [1900] 2 Ch 753); a receiver's application under O 30 r 4 for approval of their accounts by the court (*Wong Hong Toy & Anor v PP* [1988] 2 MLJ 553); an application to strike out a statement of claim (*Dr Abdul Rashid bin Abdul Majid v Yee Eh Farn* [2005] 5 MLJ 469; application for contempt made ancillary to some action or cause (*Societe Jas Hennessy & Co & Anor v Nguang Chan (M) Sdn Bhd* [2005] 4 MLJ 348).

[33] In this connection it is noteworthy that the provision on civil appeals from the subordinate courts to the High Court and from the High Court to the Court of Appeal in the CJA 1964 refer to an appeal of a 'decision' of the court below. A 'decision' is defined by s 3 of the CJA 1964 to mean 'judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties'. Accordingly, cases on interlocutory rulings or orders appealed against which are barred by s 3 of the CJA 1964 may be indicative as to the nature of the proceedings in which they are made.

[34] In *Zamrud Properties Sdn Bhd v Pang Mooi Gaid & Anor* [1999] 5 MLJ 180; [1990] SLR 785, a motion for an order that the chemistry department analyse the signature on a letter used in evidence in a sessions court trial to determine if it belonged to the second respondent was held to be not an interlocutory proceeding.

[35] In *Lim Yew Seng v Hummel International & Leisure A/S* [1996] 3 MLJ 7; [1997] 1 AMR 48 (CA), a motion for the removal of a registration of 'Hummel' trade mark for sport clothing was held not to be an interlocutory proceeding.

[36] In *NV Sumatra Tobacco Trading Company v Pt Sampoerna JL Sdn Bhd*

[1997] 3 CLJ 946, the court held that an application to set aside a trade description order is not interlocutory because it involved a determination of the rights of the parties.

[37] In *Re J (An Infant)* [1960] 1 All ER 603, an application for leave to take a ward of court out of jurisdiction was held not to be interlocutory. Similarly, in *Rossage v Rossage and others* [1960] 1 All ER 600, an application to suspend access to as child was held not to be interlocutory as it involved a determination of rights.

[38] In *Abdul Halim bin Abdul Hanan & Ors v Pengarah Penjara, Taiping & Ors* [1996] 4 MLJ 54; [1996] 1 AMR 1217, an application by originating summons for habeas corpus was held not to be an interlocutory proceeding.

[39] An application for judicial review is heard on the affidavit evidence. At the conclusion of the hearing, if the court is so minded, the court may issue a declaration, an order for certiorari quashing the impugned decision and or a mandamus directing the performance of a mandatory duty; alternatively, if there are no merits to the application, then the application will be dismissed. In this sense, the decision of the court confers finality to the question of whether the impugned decision is sustainable in law and in fact. In other words, the decision of the court on a judicial review application effectively disposes of the rights of the parties. As such, the present proceedings do not fall within the meaning of interlocutory proceedings in *Gilbert v Endean*.

[40] By reason of the foregoing, the statements and the documents contained in the affidavits of the applicant relating to Muzur Zaman and LBCN Development are expunged for the purposes of the hearing of the application for judicial review.

[41] The court will now proceed to consider the principal grounds as submitted by learned counsel for the applicant.

ILLEGALITY — IMPROPER MOTIVE/MALA FIDE

[42] According to the declaration made by the respondents pursuant to s 8 of the LAA in the Selangor State Government Gazette dated 11 October 2012, that the land is being acquired for public purpose. The text of the declaration is as follows:

> Permohonan Pengambilan Tanah di bawah Seksyen 3(1)(a) dan Pengisytiharan di bawah Seksyen 8 Akta Pengambilan Tanah 1960 bagi Tujuan Awam untuk Membolehkan Perancangan Semula Pembangunan Bandar Alam Mutiara Selaras dengan Pembangunan Sekeliling bagi Menaiktaraf Hidup Penduduk Kuala Selangor dan Mukim Ijok Khususnya.

[43] Learned counsel for the applicant argued that the real purpose to acquire the land is truly not intended to be the purpose envisioned under s 3(1)(a) of the LAA. Instead, the true purpose is with the ulterior motive and to outwit s 3(1)(b) or (c) of the LAA read together with s 3A(2) of the LAA so that the respondents need not require the applicant to participate in the development. Under the principal development approval for the land, it is envisaged that the applicant would be able to build 2,700 units of condominium. In purporting to act under s 8 the respondents had acted beyond their power or contrary to law, namely ss 3A(2) and 3B of the LAA which reads as follows:

Section 3A(2)

> Where there is a development approval granted in respect of any land and the acquisition is for the purpose of public utility, the State Economic Planning Unit, or the Committee for the Federal Territory of Kuala Lumpur, as the case may be, shall determine whether it is appropriate in the circumstances for the registered proprietor to participate in the project for which the land is intended to be acquired.

Section 3B

> In respect of an application under section 3(2), where there is no development approval for the land, section 3A shall not apply except the provision contained in subsections 1(a), (b), (c) and (7): Provided that where the State Economic Planning Unit, or the Committee for the Federal Territory of Kuala Lumpur, as the case may be, finds it appropriate or necessary in the interest of the registered proprietor that the registered proprietor participates in the project, then, in such case, the State Economic Planning Unit, or the Committee for the Federal Territory of Kuala Lumpur, may give directions to the applicant to negotiate with the registered proprietor and the provisions of sections 3A(3), (4), (5), (6) and (7) shall apply with the necessary modifications.

[44] Learned counsel submitted that as the development approval for the land was given on 12 May 2001, it is mandatory under s 3A(2) of the LAA that the State Economic Planning Unit formed under the Act to determine whether the applicant as the registered proprietor could participate in the project. This was never undertaken by the respondents with the sole intention to deprive the applicant of the land.

[45] Learned counsel for the applicant also argued that the respondents has acted in contravention of law. Firstly, the respondents failed to serve Forms E and F on the applicant pursuant to s 11(2) of the LAA. Forms E and F were only served on the applicant on the date of the inquiry at the land office on 6 December 2012. Secondly, the respondents failed to endorse onto the title upon publication pursuant to s 9(1) and (2) of the LAA. Further, there has been no notation or rectification made on the register of document of title (*S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1

MLJ 204; [1982] CLJ 65; [1982] CLJ (Rep) 314; *Hong Lee Trading & Construction Sdn Bhd v Taut Ying Realty Sdn Bhd* [1991] 1 MLJ 250).

[46] In reply, learned counsel for the respondents argued that there is nothing illegal in the decision to acquire the land. The decision was done through a valid power under the LAA; in particular under s 3(1)(a). Pursuant thereto the respondents have the power under s 8 of the LAA to declare the land is needed for the public purpose as specified in declaration was made in Form D and duly published the *Gazette*. Further, under s 8(3) of the LAA such declaration shall be conclusive evidence that all the scheduled land referred to therein is needed for the purpose specified therein. The applicant will be compensated fairly; and if the applicant is not satisfied, the applicant can refer to the High Court under s 36 of the LAA.

[47] Learned counsel for the respondents also argued that the non-service of Forms E and F is a non-issue as the applicant has admitted being served with the forms on 6 December 2012.

[48] In *Ahmad bin Saman v Kerajaan Negeri Kedah* [2003] 4 MLJ 705; [2004] 1 CLJ 211 (CA), the Court of Appeal held that notwithstanding a declaration in Form D pursuant to s 8 of the LAA, the acquisition may be challenged on any of the following grounds:

(a) that the acquiring authority has misconstrued its statutory powers;

(b) that the purpose stated in the declaration does not come within s 3;

(c) where it can be shown that the acquiring authority has acted in bad faith; or

(d) that the acquiring authority has acted contrary to the law.

[49] The Court of Appeal also adopted the test to be applied for determining the meaning of 'public purpose' as suggested by His Lordship Hashim Yeop A Sani J in *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204; [1982] CLJ 65; [1982] CLJ (Rep) 314:

> The expression 'public purpose' is incapable of a precise definition. No one in fact has attempted to define it successfully. What all the text books have done is to suggest the tests to be applied in determining whether a purpose is a public purpose. Various tests have been suggested. But in my view it is still best to employ a simple common sense test, that is, to see whether the purpose serves the general interests of the community.

[50] As it is the applicant's case that there is improper motive and mala fide on part of the respondents, it is incumbent upon the applicant to introduce the

necessary evidence in support of its allegation. Unfortunately, in the present case, there is no evidence before the court to show that there is any improper motive or mala fide on the part of the respondents. A

[51] The requirement under s 9 of the LAA for a note to be entered on the register document of title is directory and not mandatory as its purpose is in substance also covered by the publication in the *Gazette* (see *S Kulasingam & Anor v Commissioner of Lands Federal Territory & Ors,*). B

[52] The Forms E and F were in fact served on the applicant on 6 December 2012. Even if the Form E was not served on the applicant, it is provided in the last para in sub-s (1) of s 11 that no omission or failure to serve such notice shall invalidate any enquiry held pursuant to the notice or any award made upon the conclusion of the enquiry. At any rate, at the request of learned counsel for the applicant, the court had ordered a stay of proceedings of the enquiry pending the disposal of this action. As such, there is no prejudice to the applicant. C D

[53] As for the applicant's contention of improper motive or mala fide, the court is unable to accept the arguments of the applicant that since there is a development approval for the land, it is incumbent upon the State Economic Planning Unit to determine whether it is appropriate in the circumstances for the applicant qua registered proprietor to participate in the project for which the land is intended to be acquired. There is no evidence on the affidavits to suggest that the respondents were actuated by improper motive or mala fide. In fact, the applicant has failed to produce any evidence to challenge the acquisition under any of the four grounds enumerated in Ahmad Saman. E F

[54] Accordingly, in all the circumstances, there is nothing to persuade the court that the true intention of the respondents is to circumvent or override s 3(1)(b) or (c) of the LAA. The fact that there is a development approval of the Land does not necessarily preclude the respondents from making an acquisition under s 3(1)(a). G

[55] For the foregoing reasons, the application for judicial review is dismissed with costs. H

Application for judicial review dismissed with costs.

Reported by Kanesh Sundrum I